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QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD

Written statement* submitted by the Jammu and Kashmir Council for Human Rights (JKCHR), a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[16 January 2002]

*This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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United Nations and the member nations India and Pakistan, are committed to a 'programme package', in regards to the human rights and fundamental freedoms in Kashmir. UN resolutions are in reference to the question of 'peace and security' and India and Pakistan as partiers to the dispute have acquiesced to the jurisprudence of the Charter obligations. They have agreed to ensure human rights and fundamental freedoms and on an outline to secure the right of self-determination in Kashmir.

The two states have committed themselves, to many other bilateral agreements, namely Tashkent Declaration of January 1966, Shimla Agreement of July 1972 and Lahore Declaration of February 1999. The principle of non-interference in the internal affairs of each other and the settlement of disputes through bilateral negotiations or by any other peaceful means are the principal essentials in these declarations and agreements. A reference to the UN Charter, makes them complementary to the UN 'programme package' on Kashmir.

Over the years we find that UN failed to assume its role under UNCIP resolutions in the Pakistani controlled part of Kashmir – called Azad Kashmir. Pakistan has moved in and assumed responsibilities under UNCIP resolutions in Azad Kashmir. However, it has not defined the corresponding legal limits of this control. There is no recourse to adjudge that the exercise of responsibility is reasonable and in good faith, for the proper purpose only and in accordance with the spirit as well as the letter of the UNCIP resolutions.

In regards to the people of Northern Areas, Gilgit and Baltistan, Pakistan has decided to remain at variance with UNCIP resolutions and continues to seek reliance on an Agreement of April 1949. India and Pakistan are holding on to such agreements in the name of the people. However, these agreements remain suspect because they have been manipulated. They do not reflect the 'mature judgement' and the 'enlightened conscience' of the Kashmiri representatives. There is no evidence of any reference to the free will of the people.

United Nations failed to establish a government in the Indian controlled Kashmir at Srinagar in accordance with Security Council Resolution 47(1948) of 21 April 1948, comprising of major political groups. Although there have been election in 1951, 1957, 1962, 1972, 1983, 1987 and 1996, yet the dispute continues on the question of the 'transfer of the free will' of the people. It is admitted on balance that 'the will of the people' has not been the 'basis of the authority of government' in the Indian controlled Kashmir. It is in this context that Indian Prime Minister on 15th August 2001 acknowledged the 'pain and agony' of the people of Jammu and Kashmir and promised that when the elections to the new State Assembly took place, "we shall ensure free and fair elections".

The lack of understanding in the political ranks, lack of a 'mature judgement' and the non use of 'enlightened conscience' or making of an 'informed choice', in the various parts of Jammu and Kashmir, has reduced the regime of human rights and fundamental freedoms to a flattering poor low.

The political disciplines, the militants and the Indian security forces, use a treble threat of coercion on the civil society, to seek compliance of the three sorts on the question of participation and the boycott of elections.

Political organizations on account of their lack of understanding of the jurisprudence of UNCIP resolutions, the jurisprudence of self-determination under article 1(2) of UN Charter, article 1(1)

of ICCPR and article 1(1) of ICESCR and the jurisprudence of elections under article 21(1) (2) (3) of the Universal Declaration of Human Rights, article 25(b) of ICCP are making a serious error in coercing the people to boycott the elections.

This error of judgement on the part of political organizations and the threat of the use of force by militants against those participating in elections is a violation of a basic human right i.e., to take part in the conduct of public affairs'. Since UN has settled the issue of self-determination and elections in the case of Kashmir a continued misrepresentation by political organizations and a violation of this right accrues an aggravated liability in the conduct of public affairs.

In securing the human rights and fundamental freedoms in complex situations like Kashmir, the principal essential, that should merit our attention is whether or not the leadership qualifies the test, (a) of 'Principality' set out in UNCIP resolutions, (b) is able to exercise a 'mature judgement', (c) has an 'enlightened conscience' to make an informed choice and (d) above all whether it has the 'mandate' or the ' authoritative instruction' from the people.

It is important for us to understand and take cognisance that politicians in Kashmir and the militants rest their case on UNCIP resolution and anchor it on the 'freedom of expression'. However, they conveniently continue to remain ignorant about round the corner jurisprudence of General Assembly resolution 46/137 of 17 December 1991 on the importance of election and how elections impact the effective enjoyment of a wide range of other human rights and fundamental freedoms.

The GA resolution in para 3 holds that "periodic and genuine elections are necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights".

The Kashmiri political schools advising the people to boycott the elections, in fact, are guilty of not taking the measures that could effectively protect a wide range of other human rights and fundamental freedoms. We have to take cognisance of the loss of human life in Kashmir and sensitize the question of a criminal liability of politicians in the conduct of public affairs and of the Indian security forces in the face of restraining discipline of UNCIP resolutions.

As a principle and more so in the face of proxy politics and proxy war in Kashmir, there is an urgency to complement the pledge of Indian Prime Minister that "we shall ensure free and fair elections" by securing an 'effective administration of justice during elections' and by focusing on 'non-interference with rights and the existence of an environment free of intimidation'.

India as a member nation of UN and as a democracy, should have more institutional reasons than many other member nations, to accord more meaning to the 'Duty of Service' that the UN General Assembly envisaged in 1979 in the Code of Conduct for Law Enforcement Officials. It imposes a duty of service to the community upon all officers of the law. The notion requires that security forces strive to ensure that all citizens benefit from elections that are administratively sound and free of any disruptive forces, which seek to undermine, the free expression of popular will.

The Code of Conduct provides that "law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights". This includes not only the human right to take part in elections but all human rights. Therefore we have to bear in mind that police agencies and

security forces that do not respect fundamental human rights have the potential to create an intimidating atmosphere that will inhibit the electorate and thereby subvert the genuineness of the elections' outcome.

The test of representation therefore is to serve one's constituents by the exercise of a 'mature judgement' and an 'enlightened conscience'. The great merit of the 'mandate doctrine' is that it seems to impose some kind of meaning upon an election and so offers popular guidance to those who exercise government power.

We need to remain knowledgeable about the poor information on political issues, little knowledge of the content of manifestos, influence of 'irrational factors', such as the personality of party leaders, the image of parties or habitual allegiance formed through social conditioning and create awareness through human rights education. We also need to deflect the danger inherent in deals and trade-off negotiated after the elections.

The State of Jammu and Kashmir shall go to the 9th poll since 1951 in October/November 2002. The ability of the people to elect their representatives, has suffered an on going prejudice. In the exercise their human right they shall be exposed to a treble coercion, of politicians, militants and security forces, all seeking separate compliance. Kashmir is an exceptional situation and over 2 million Kashmiris have lost their homes. They have been displaced internally and across the borders as well. It needs to be pointed out that the people of Kashmir, are poorer than the poor people of India and Pakistan. They continue to suffer inequities and receive far less fair treatments under the two administrations of India and Pakistan.

Their suffering dates back to 1877. Although they won the argument of 'State for the State's People', they failed to win the subsequent arguments of 'responsible governments'. It is high time that we assist the people of Jammu and Kashmir, to ensure that the basis of governance is the free will of the people and that we take measures under UNCIP resolutions, Tashkent Declaration, Shimla Agreement and Lahore Declaration, to empower the people, placed in three administrative controls. We should ensure that the right to self-determination and right to take part in elections are understood as two separate rights. That participation in election is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights.